

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000070-MR

KENDRA HAWKINS

APPELLANT

V.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 93-CI-00022

KEVIN R. HAWKINS

APPELLEE

OPINION REVERSING

* * * * *

BEFORE: GUDGEL, Chief Judge; EMBERTON and McANULTY, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from an order entered by the Carroll Circuit Court granting a motion to modify a child custody decree. Because we agree with appellant's contention that the trial court was without authority to hear the motion to modify, we reverse.

The parties married in 1991 and divorced in 1994. They initially agreed to share joint custody of their only child, and the dissolution decree provided that all "child custody, visitation and child support" issues were "reserved for further hearing or agreement of the parties." Several years later, in April 1997, appellee filed a motion noting that the court had never entered a final custody decree, and asking for an award of

"temporary and/or permanent sole custody" of the child. One month later, an agreed order to share joint custody was entered. Various disputes followed, and eventually appellee filed a motion for contempt and emergency temporary custody in February 1999. Pending completion of an investigation of the situation by the Cabinet for Families and Children, the court entered an order in March 1999 modifying the parties' visitation schedule. The court then entered an order in December 1999 which, for the first time, awarded primary physical possession of the child to appellee. This appeal followed.

KRS 403.350 requires in pertinent part that:

A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. (Emphasis added.)

Moreover, any motion to modify a custody decree which is filed within two years "after its date" must be accompanied by "affidavits." KRS 403.340(1). As noted in Petrey v. Cain, Ky., 987 S.W.2d 786, 788 (1999),

[r]ead together, these two statutes require that a motion to modify a prior custody decree must be accompanied by at least one affidavit; and if the motion is made earlier than two years after its date, it must be accompanied by at least two affidavits. See Copas v. Copas, Ky. App., 699 S.W.2d 758 (1985). If the applicable requirement is not met, the circuit court is without authority to entertain the motion.

Here, the court's December 1999 order concerning primary physical possession was prompted by appellee's "motion for contempt and for emergency temporary custody," and it was entered even though

the motion was not accompanied by a single affidavit. Appellee relies on Gladish v. Gladish, Ky. App., 741 S.W.2d 658 (1987), in arguing that this shortcoming amounted to a mere procedural irregularity which does not compel us to reverse the court's order. However, Gladish is clearly distinguishable from the instant action, as the trial court in Gladish, sua sponte, awarded temporary custody to the mother even though the father's motion raised only the issue of visitation. The father later was awarded temporary custody based on his motion which was accompanied by two "vague and conclusory" affidavits. Id. at 661. Although this court described the custody litigation as "flawed from the very outset," id., we concluded in the particular circumstances presented there that the mother could not be afforded the requested relief on appeal, since the defective temporary custody order had been replaced by a judgment awarding custody to the father.

Here, by contrast, appellee filed a motion to modify custody. We need not address the issue of whether in these circumstances appellee was obligated to file one, or two, affidavits since it is undisputed that he filed none. As noted in Petrey, although the term "subject matter jurisdiction" ordinarily refers to a court's authority to resolve a particular class of cases rather than a particular individual case, a trial court may lack "jurisdiction over a particular case at issue, because of a failure by the party seeking relief to comply with a prerequisite established by statute or rule." Id., 987 S.W.2d at 788.

Clearly, appellee failed to satisfy the statutory prerequisite to filing his motion to modify custody because no affidavits were filed. Thus, the trial court did not acquire subject matter jurisdiction to consider his motion to modify. Because defects in subject matter jurisdiction are not waivable, and since they may be raised by either party or the court at any time, there is no merit to appellee's argument that appellant waived the issue by his failure to object below. See Commonwealth Health Corp. v. Croslin, Ky., 920 S.W.2d 46 (1996); Gullett v. Gullett, Ky. App., 992 S.W.2d 866 (1999). Hence, we hold that the trial court was without authority to consider the merits of appellee's motion to modify.

Given our decision thus far, it is unnecessary to address appellant's remaining arguments. We do note, however, that any future litigation regarding modification of custody should be adjudicated consistent with this court's recent decision in Scheer v. Zeigler, Ky. App., 21 S.W.3d 807 (2000). Moreover, it should be noted during any such proceedings that although the order from which this appeal was taken refers to appellee's alleged violation of a March 1999 court order directing her to have no contact with two named felons, our review of the record in fact indicates that both the May 1997 agreed order and the March 1999 order prohibited only contact between the child and the felons, or between appellant and the felons while the child was in her care.

The court's order is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerry M. Miniard
Florence, KY

BRIEF FOR APPELLEE:

Elizabeth Chandler Lester
Williamstown, KY